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CHARLES ELMORE DROPLEY

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 967

THE AUTOCAR SALES AND SERVICE COMPANY,
Petitioner,

vs.

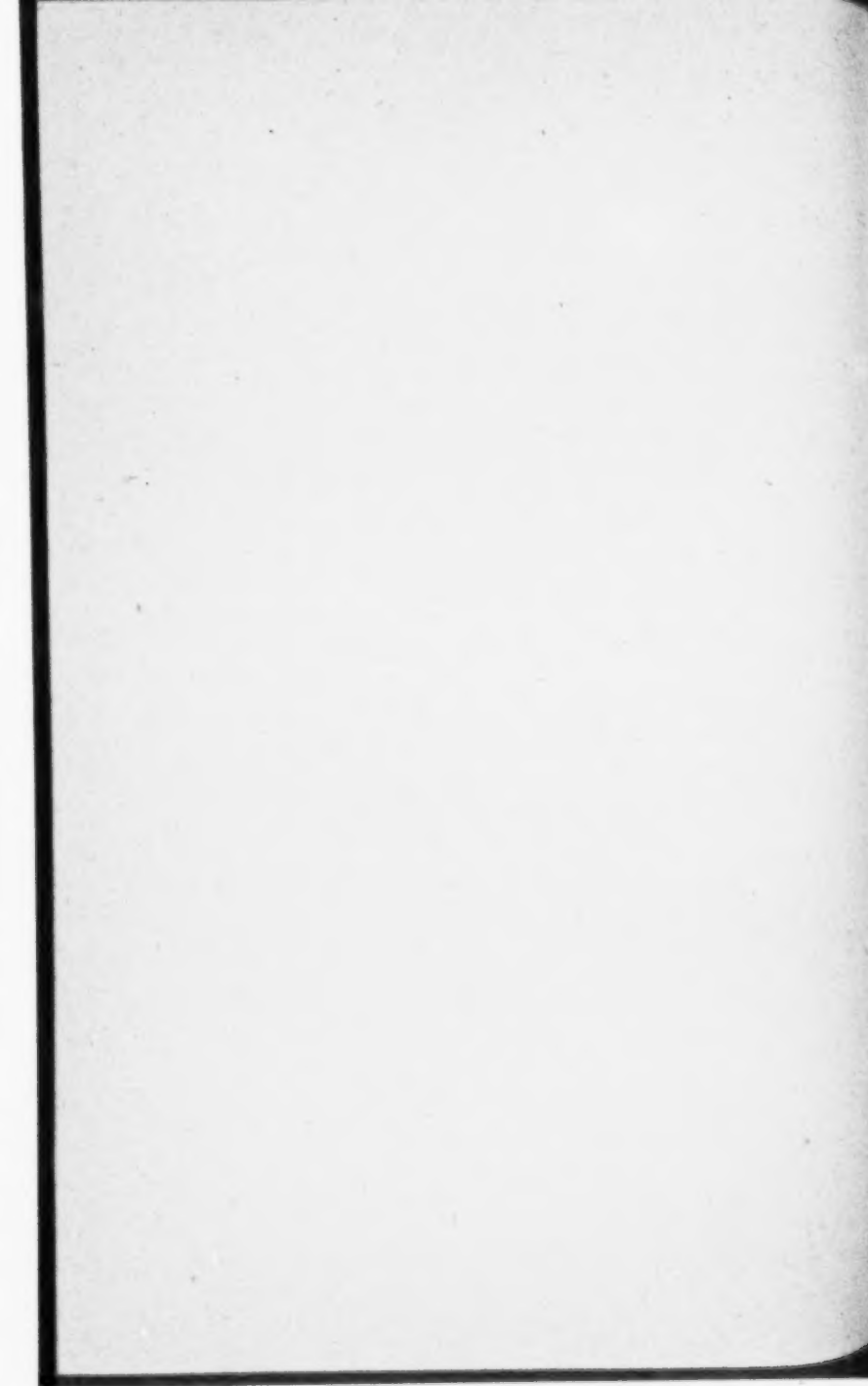
A. G. LEONARD, F. H. PRINCE, AND D. H. REIMERS,
NOT AS INDIVIDUALS, BUT AS TRUSTEES OF THE CENTRAL MAN-
UFACTURING DISTRICT,

Respondents.

**PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF.**

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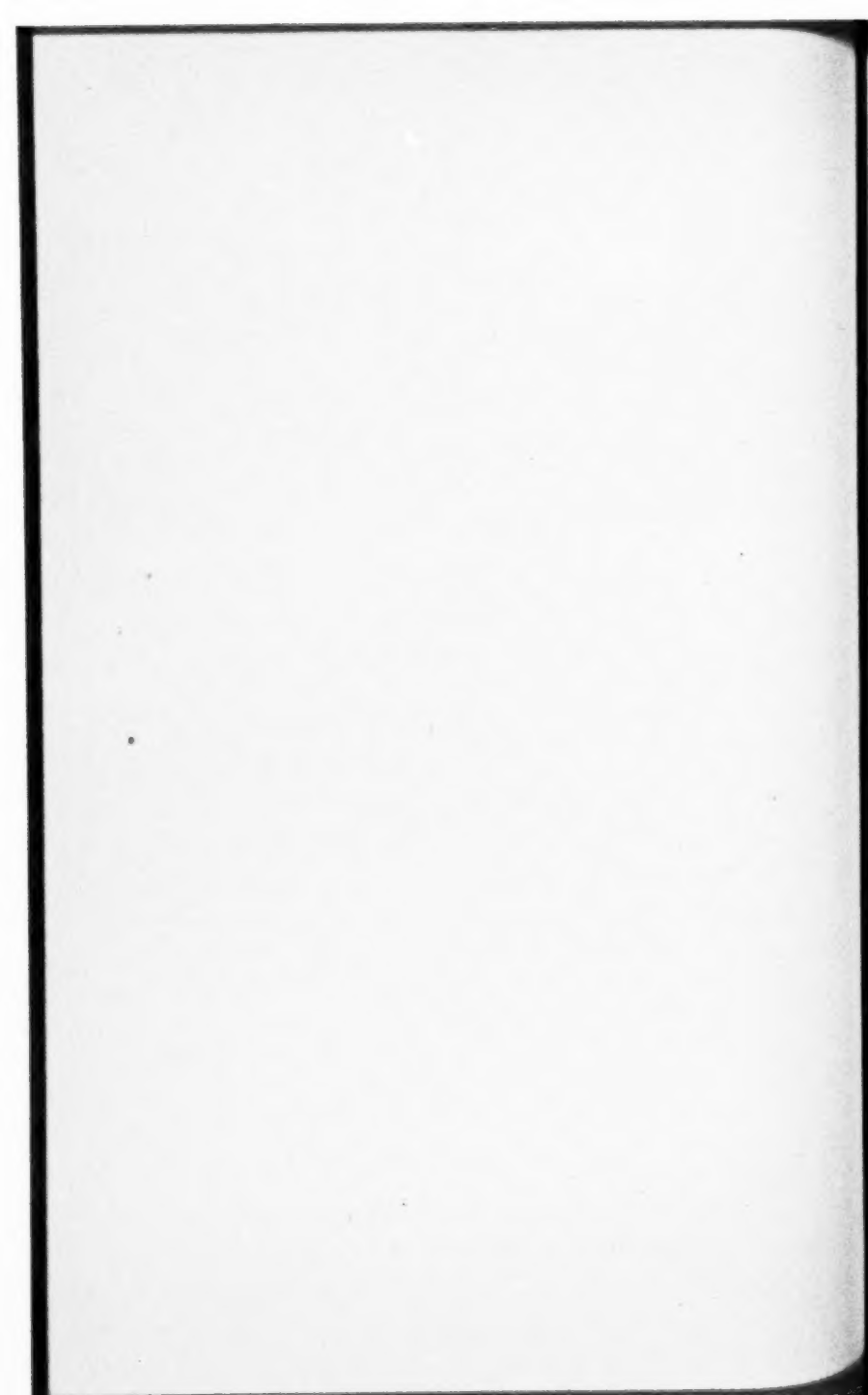
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945.

No.

THE AUTOCAR SALES AND SERVICE COMPANY,
Petitioner,
vs.

A. G. LEONARD, F. H. PRINCE AND D. H. REIMERS,
NOT AS INDIVIDUALS, BUT AS TRUSTEES OF THE CENTRAL
MANUFACTURING DISTRICT,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioner, The Autocar Sales and Service Company, a New Jersey corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered November 21, 1945.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.**(A) Nature of the Action.**

This is a complaint at law by respondents against petitioner, seeking recovery of rent under a written lease for the period from April 1, 1943 to January 1, 1944, amounting (including interest) to \$9,536.10.

(B) Nature of the Pleadings.

Because the case was decided below on the pleadings, which are concise, it is necessary to examine them.

1. Complaint.

The respondents allege that on December 1, 1926, they entered into a lease with petitioner whereby they demised to petitioner certain real property in Chicago, Illinois, for a period of 20 years (R. 1); that petitioner covenanted to pay an annual rental of \$10,700 in equal monthly installments, unpaid installments to bear interest at the rate of 7% per annum (R. 2); that petitioner entered into possession and paid the rental due under the lease up to and including the month of March, 1943, but refused to pay the rental for the period from April 1, 1943, down to and including January 1, 1944 (R. 2), and that such unpaid rental and interest thereon amount to \$9,536.10, for which respondents pray judgment (R. 3).

A copy of the lease is attached to the complaint as an exhibit (R. 3 to 39).

2. *Answer.*

The petitioner admits the execution of the lease and the refusal to pay the rental for the 10 months in question (R. 39).

For its defense, petitioner alleges that shortly prior to March 11, 1943, the use of all of the property described in the lease was deemed necessary by the Secretary of War of the United States of America to be acquired for military purposes; that the Secretary of War of the United States requested the Attorney General of the United States to institute proceedings to acquire by condemnation the temporary use of the entire property described in the lease pursuant to the federal statutes in such case made and provided (R. 40); that the Secretary of War requested the condemnation of the land for a term ending June 30, 1943, with the right to extend the term for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War; that on or about March 11, 1943, the Attorney General of the United States caused to be filed in the District Court of the United States of America for the Northern District of Illinois, Eastern Division, a petition for condemnation by the United States of America against the land and against respondents and petitioner in this cause, the condemnation proceedings being known as 43 C 270; that upon the filing of the petition for condemnation, an order was entered by the District Court of the United States on March 11, 1943, condemning and taking by the United States of America, for military and other war purposes, the temporary use of all of the real property described in the lease, together with the improvements thereon and appurtenances thereunto belonging, and it was thereupon ordered by the District Court that delivery of immediate possession be made of all of the real estate described in the lease (R. 40); that subsequently, on May 1, 1943, the

United States of America and the Secretary of War served notice upon the respondents and petitioner in this cause that they had determined and thereby elected to extend the term for the use of the property described in the lease for an additional yearly period beginning July 1, 1943 to and including June 30, 1944 (R. 41); that the condemnation of the use of the property is subject to the right of the Secretary of War to extend the term of condemnation for indefinite future additional yearly periods (R. 41).

Further answering, petitioner alleges that under Article VI of the indenture of lease, the petitioner's use of the premises thereby demised was limited to the storage, sale and service of automobiles and automobile trucks, which is the business in which petitioner has been for many years and is still engaged; that the condemnation of the premises on March 11, 1943, rendered them incapable of occupation for any purpose consistent with the lease; that in March, 1943, petitioner was doing a very substantial business in the storage, sale and service of automobiles and automobile trucks, and required a building in which it could continue such business; that petitioner was then obliged to seek and obtain a new building in order to continue its business; that on March 25, 1943, petitioner purchased another building in Chicago, Illinois for \$50,000, and then moved its place of business from the premises described in the lease to the newly purchased premises (R. 41). (The courts below would take judicial notice that the new building was about 7 miles from the condemned building.)

Petitioner further alleges that by reason of the aforesaid facts, it was evicted by paramount right from the entire premises described in the lease, and the relation of landlord and tenant between the parties was thereby abrogated, and the lease was terminated by operation of law; that the premises described in the lease were ren-

dered incapable of occupation for any purpose consistent with the lease, and that all liability of petitioner to pay rent ceased on March 11, 1943, the date of the order of condemnation (R. 41-42).

3. *Motion to Strike Answer.*

The respondents interposed a motion to strike petitioner's answer on two grounds:

(a) It appears from the answer that the United States of America has not condemned the property for the balance of the term, and the taking of a portion of the term, less than the whole, and for a period which will terminate before the period of the lease terminates, does not terminate the lease and does not relieve petitioner from the payment of rent (R. 42).

(b) The fact that the United States of America has the right to condemn for a longer period than that already taken is not an excuse for the non-payment of the rent (R. 42).

(C) **Decision of the Issues.**

The trial court (the Superior Court of Cook County, Illinois, the honorable John C. Lewe, judge presiding) sustained respondents' motion to strike petitioner's answer (R. 42-43). Petitioner elected to stand and abide by its answer, and suffered judgment for \$9,536.10, the amount claimed due in the complaint (R. 43).

An appeal was prosecuted to the Appellate Court of Illinois, First District, which affirmed the judgment of the trial court (R. 45). The opinion of the Appellate Court is printed in full at R. 46-58, and is reported in 325 Ill. App. 375, 60 N. E. (2d) 457.

A certificate of importance (by which the judges of the Appellate Court certified that in their opinion the

questions of law involved in this case were of such importance that they should be passed upon by the Supreme Court of Illinois) was granted and an appeal allowed by the Appellate Court to the Supreme Court of Illinois (R. 45).

The Supreme Court of Illinois affirmed the judgment of the Appellate Court (R. 69-70). The opinion of the Supreme Court is printed in full at R. 60-69, and is reported in 392 Ill. 182 (advance sheet No. 3), 64 N. E. (2d) 477 (advance sheet No. 6).

A petition for rehearing (R. 71-74) filed by petitioner was denied by the Supreme Court of Illinois on January 17, 1946 (R. 74). Petitioner's motion to stay the issuance of the mandate was granted (R. 75), in order to enable petitioner to apply to this court for a writ of certiorari.

II.

JURISDICTIONAL STATEMENTS.

The jurisdiction of this court is invoked under section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 937 (28 U. S. C. A. sec. 344(b)).

The right, privilege or immunity specially set up or claimed by petitioner is under the Second War Powers Act of March 27, 1942, (Ch. 199, Title II, sec. 201, 56 Stat. 177, Tit. 50 U. S. C. A. App. sec. 632), which amended the Act of July 2, 1917 (Ch. 35, 40 Stat. 241, 50 U. S. C. A. sec. 171) by adding at the end thereof sec. 2, quoted in full in the appendix to petitioner's supporting brief.

On March 25, 1943, the President of the United States issued Executive Order No. 9321 (8 F. R. 3749, Tit. 50 U. S. C. A. App. sec. 632, p. 258), which is quoted in full in the appendix to petitioner's supporting brief.

The judgment of the Supreme Court of Illinois sought to be reviewed is dated November 21, 1945 (R. 69-70), and petitioner's petition for rehearing was denied January 17, 1946 (R. 74).

The nature of the case and the rulings of the courts below were such as to bring the case within the jurisdictional provisions relied on, because:

(a) Petitioner alleged in its answer in the trial court (as more fully set forth in the summary and short statement of the matter involved, *supra*) that, pursuant to the federal statute, the Attorney General of the United States, at the request of the Secretary of War, filed a petition for condemnation in the federal District Court by which the United States acquired full possession of the entire premises leased to petitioner, for the entire period during which the rent sued for accrued, for military and other war purposes (R. 40-41). Petitioner in its answer specially set up and claimed that, by reason of these facts, it is immune from the liability asserted by respondents (R. 41-42).

(b) The trial court sustained respondents' motion to strike petitioner's answer, holding as a matter of law that petitioner does not enjoy the immunity claimed by it (R. 43). On successive appeals to the Appellate Court of Illinois and the Supreme Court of Illinois, those courts affirmed the judgment.

The cases believed to sustain jurisdiction are: *Illinois Steel Co. v. B. & O. R. Co.*, 320 U. S. 508, 510-511; *Stoll v. Gottlieb*, 305 U. S. 165, 167; *Motlow v. State ex rel. Koeln*, 295 U. S. 97, 98; *St. Louis, Iron Mtn. & So. Ry. v. McWhirter*, 229 U. S. 265, 275-277; *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281, 293; *Eau Claire National Bank v. Jackman*, 204 U. S. 522, 532; *American Express Co. v. Michigan*, 177 U. S. 404, 406-407; *McCormick v. Market Bank*, 165 U. S. 538, 546-547.

The grounds upon which it is contended that the question involved is substantial are as follows:

(a) It is a matter of common knowledge that during World War II the temporary use of hundreds of large plants under leasehold was condemned by the federal government under the Second War Powers Act for military and other war purposes. It is believed safe to conjecture that the rents accruing under such leases during the period of governmental appropriation amount to many millions of dollars. It is highly desirable and important that subordinate courts, litigants and the bar have for guidance the expression of this court on the questions of public importance here presented.

(b) The hardships visited upon petitioner as a result of the judgment below are foreign to principles of American justice. While being deprived of the use of its premises, petitioner would, nevertheless, under the judgment sought to be reviewed, still be obliged to pay rent, water rates (R. 6), general taxes (R. 6), special assessments (R. 7), maintain the buildings in first class condition and repair (R. 11), water, cut and maintain the lawn and shrubs (R. 20), keep the premises insured at its own cost (R. 20), etc.

(c) While the amount of the judgment involved is \$9,536.10, the ultimate outcome of this litigation will determine liability for an additional sum of \$31,593.14, plus interest, being the rent for the remainder of the term not yet sued for, or a total liability of upwards of \$41,000.00.

The federal question sought to be reviewed was raised in the court of first instance in the answer of petitioner to respondents' complaint (R. 40-42). The petitioner there alleged that it was immune from liability for rent by reason of the Government's exclusive appropriation of the demised land pursuant to the federal statutes. Respondents'

motion to strike petitioner's answer, which tested the legal sufficiency of petitioner's defense, was sustained by the court of first instance (R. 43), and that ruling was the sole issue reviewed and affirmed by the Appellate and Supreme Courts of Illinois.

The opinions of the Appellate and Supreme Courts of Illinois are printed in full at R. 46-58 and R. 60-69, respectively, and are incorporated by reference as a part of this petition.

III.

THE QUESTIONS PRESENTED.

1. Does the taking by the United States of America, by the exercise of the power of eminent domain, under the Second War Powers Act, of an entire parcel of leased property for temporary use, for military and other war purposes, for a definite period of 15 months, with the right to extend the period of the taking for future indefinite yearly periods, which may fall short of or exceed the remaining term of the lease, thereby rendering the property incapable of occupation for any purpose by the lessee, operate to abate the rent *pro tanto*, and to discharge the lessee from liability to the lessor for rent accruing during the period of such appropriation by the government of the use of the demised premises?

2. Does such a taking as is described in Question No. 1 constitute eviction of the lessee by paramount right and terminate the lease by operation of law?

3. Does such a taking as is described in Question No. 1 require the application of the doctrine known as "frustration of purpose" or "commercial frustration," so as to terminate the lease by operation of law?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The judgment below is in conflict with this court's decision in *Gates v. Goodloe*, 101 U. S. 612.

2. If the law of *Gates v. Goodloe* does not control the issues, then this is a case of first impression arising under the Second War Powers Act, and the language of this court in *United States v. Petty Motor Co.* (consolidated cases Nos. 77-83, not yet officially reported, opinions delivered February 25, 1946), should either control the issues or be strongly persuasive for the abatement of rent *pro tanto*.

3. A substantial federal question is presented. The United States of America, pursuant to the Second War Powers Act, has condemned the temporary use of many leasehold estates throughout the country. Subordinate courts, litigants and the bar should have the benefits and advantages accruing from a judgment of this court on the issue involved. The interpretation of the effect of the federal statute in the circumstances of this case is a question of public importance.

4. Unless relief be granted petitioner, it will suffer extreme and irreparable hardships. *While being deprived of the use of its premises*, it would, nevertheless, under the judgment sought to be reviewed, still be obliged to pay rent, water rates (R. 6), general taxes (R. 6), special assessments (R. 7), maintain the buildings in first class condition and repair (R. 11), water, cut and maintain the lawn and shrubs (R. 20), keep the premises insured at its own cost (R. 20), etc.

If this court should consider that the Supreme Court of Illinois rightfully concluded that the lease was not

terminated by eviction under paramount right nor by the doctrine of commercial frustration, petitioner urges that the judgment below should still be reviewed and reversed, because it is in conflict with *Gates v. Goodloe*, 101 U. S. 612, in that it does not abate the rent *pro tanto*. In that event, petitioner respectfully submits that this court should grant a limited writ of certiorari, confining the review to an examination of the sole question whether the taking operated to abate the rent *pro tanto*.

J. GLENN SHEHEE,
Counsel for Petitioner.

RAYMOND F. HAYES,
Of Counsel.

(Brief in Support Follows)